Ct. 44; and *State* quarantine laws, *R. R. Co.* v. *Huson,* 95 U. S. 465, 24 L. Ed. 527.

In view of the decisions of the Supreme Court relative to the WILSON ACT it does not seem as if there should be much doubt as to the constitutionality of the WEBB-KENYON ACT. That this Act is not likely to be declared invalid is apparent from the broader and more reasonable view the Supreme Court has been taking of the police power of the States. One cannot but realize this change of attitude by the court after reading *Silz* v. *Hesterberg,* 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. 10. The New York laws prohibited the having in possession certain game birds during the closed season. The relator, an importer, was prosecuted for unlawfully having in his possession certain game birds, these birds coming from Russia. This law was held to be a valid exercise of the police power of the State, as the State could not effectively enforce its game laws protecting domestic birds unless it could prohibit the having in possession of such birds although imported. In connection with this case, the question arises whether or not, according to this decision, a State might not prohibit the importation of liquor provided it has already prohibited the use, sale, and manufacture of the same within the State. G. E. K.

THE STATUTE OF FRAUDS AND INDEMNITY CONTRACTS.—There are few subjects upon which the decisions have been in greater confusion than the application of the statute of frauds to indemnity contracts in general. The recent action of the Virginia court in *Alphin* v. *Lowman,* 79 S. E. 1029, overruling its former decision in *Wolverton* v. *Davis,* 85 Va. 64, illustrates a tendency toward uniformity at least.

Part of the confusion upon the subject seems to have resulted from the tendency of the courts to treat indemnity contracts as a distinct class always showing certain characteristics. This is probably due to a broad statement in one of the earliest cases on the subject, *Thomas* v. *Cook,* 8 Barn. & A. 728, that "a contract of indemnity does not come within the words or spirit of the statute of frauds." This statement is manifestly too broad, since for the purposes of the statute of frauds it is impossible to treat all indemnity contracts alike. The one question is whether the contract is a promise to answer for the debt of another, and in this respect indemnity contracts may differ widely. It is true that the ordinary contract of indemnity does not come within the statute for very good reasons, but as was said in *Green* v. *Creswell, infra,* almost any contract of guaranty can be so framed as to amount to a promise to indemnify.

All indemnity contracts come within one of the general principles which limit the application of the statute of frauds—that a promise made to a debtor to discharge his debt is not a promise to answer for the debt of another, since to come within the statute the promise must be made to the creditor. For this reason we can always dismiss from consideration the main obligation which the promisee has assumed. As to this he is a debtor and to the extent that the contract of indemnity is a promise to answer for this debt the statute

of frauds certainly has no application. Many contracts of indemnity involve only this question, and where this is the case the authorities are practically unanimous in holding that they are not within the statute. A typical example of such a contract is a promise to indemnify a sheriff for making a levy upon property claimed to be exempt from levy, *Lerch* v. *Gallup,* 67 Cal. 595, 8 Pac. 322. With these may be classed promises to indemnify a surety on a criminal bail bond, since the prisoner is under no obligation to indemnify him, *Cripps* v. *Hartnoll,* 4 Best & S. 414, 116 Eng. C. L. 116; *Anderson* v. *Spence,* 72 Ind. 315. But the distinction between civil and criminal bonds does not seem to be generally recognized in this country, *May* v. *Williams,* 61 Miss. 126.

But there are other contracts of indemnity which involve different questions, and it is as to these that confusion has arisen. These are the cases where, in addition to the promise of the defendant to indemnify, there is a co-existing obligation on a third person to pay the same obligation. The typical case of this kind is a promise to indemnify another if he will become surety for a third person on a note, bond, or other obligation. As already seen, we can dismiss all question of the surety's obligation on the instrument. But arising at the same time there is an implied obligation on the part of the principal to indemnify the surety against any loss which he may sustain by reason of the contract. As to this obligation the surety is a creditor. True, this is merely a promise implied in law, but it is not necessary that the obligation guaranteed should arise from an express contract, BROWNE, STATUTE OF FRAUDS, § 158. Else all guarantees of obligations arising from torts would be without the statute. The question is as to the relation between this implied obligation and the express promise to indemnify; whether one of them is collateral to the other or whether they are both independent and original undertakings which have no connection.

Where this question has been presented in its simplest form, as where the promisor was a stranger to the main contract, and his object was not to benefit himself by his undertaking, the courts have split and are still fairly evenly divided. Such a case was *Green* v. *Creswell,* 10 A. & E. 453, the leading English case holding such promises not to be within the statute. This case took exception to the broad doctrine of *Thomas* v. *Cook,* already mentioned. It is no longer authority in England, having been overruled in *Wild* v. *Dudlow,* L. R. 19 Eq. Cas. 198, in which the doctrine of *Thomas* v. *Cook* was reinstated. This vacillation among the English authorities has led to confusion in the American decisions. Several courts follow *Green v. Creswell* in holding that such promises are not within the statute. It is difficult to avoid the conclusion reached in these cases if it is admitted that the promises concerned have any relation whatever. They are both to pay the same debt, and the obligation of the principal can scarcely be said to be collateral to anything, since he is the person ultimately liable to pay the debt. The American cases sustaining this view which are still authorities in their jurisdictions may be classified as follows: Early cases decided without reference to the English authorities—*Brown* v. *Adams,* 1 Stew. (Ala.) 51; *Simpson* v. *Nance,* 1 Spears (S. C.) 4; *Draughton* v. *Bunting,* 31 N. C. 10; cases

decided upon the authority of *Green* v. *Creswell—Bissig* v. *Britton,* 59 Mo. 204; *Easter* v. *White,* 12 O. St. 219; *Clements' Appeal,* 52 Conn. 464; more recent cases decided after a thorough review of the authorities on both sides of the question—*Nugent* v. *Wolf,* 111 Pa. St. 471, 4 Atl. 15; *Macey* v. *Childress,* 2 Tenn. Ch. 438; *May* v. *Williams,* 61 Miss. 126, 48 Am. St. Rep. 80; *Hartley* v. *Sandford,* 66 N. J. L. 627, 50 Atl. 454, 55 L. R. A. 206.

On the other hand, the majority of American cases in which the question has been presented have held that such a contract of indemnity is not within the statute of frauds. But when the cases involving other questions are omitted the majority is not overwhelming. It is impractical to review all of the decisions sustaining this view. Many of them will be found cited in *Hartley* v. *Sandford, supra,* and *Rose* v. *Wollenburg,* 31 Ore. 269, 44 Pac. 382, 39 L. R. A. 378; and in notes to 42 Am. St. Rep. 181 and 126 Am. St. Rep. 512 and in Ann. Cas. 1912 A 882. The weakness of these cases as authority is that scarcely any two of them give the same reason why such contracts do not come within the statute. Many of them are based upon prior decisions involving a simple indemnity contract, which we have seen does not raise the present question. This may be said of the leading case of *Aldrich* v. *Ames,* 9 Gray 76. Two other much-cited cases, *Chapin* v. *Lapham,* 20 Pick. 467, and *Dunn* v. *West,* 5 B. Mon. 376, are based upon the fact that the whole credit was given to the promisor and not to the principal on the obligation. However certain a test this may be in the case of an ordinary sale, it has no application to contracts of suretyship, since the law implies a promise on the part of the principal to indemnify the surety, regardless of upon whose credit the latter acted. Tests such as this are useful in determining whether there is any liability in a third person. Such liability is admitted in the present cases. The only question is whether the obligations have any connection. This would seem to depend entirely upon the nature of the promise sued upon. Regardless of upon whose credit the surety acted, if the promise to indemnify was made with reference to the obligation of the principal to the surety, it is difficult to see how it is not collateral to it. On the other hand, if this obligation was not in the contemplation of the parties, the fact that the promises are to do the same thing should not necessarily make one a promise to answer for the other. That there can be independent promises to do the same thing was made clear in *DeWolf* v. *Rabaud,* 1 Pet. 476.

By far the greater number of cases in which the question has arisen have involved other questions than the one discussed above. These complicating causes have been discussed and classified in *Hartley* v. *Sandford* and *Rose* v. *Wollenburg, supra.* Perhaps the most common case is that in which one already a surety on an obligation induces another to become co-surety with him by means of a promise to indemnify him against loss. These were the facts in *Thomas* v. *Cook,* and the doctrine of that case is sometimes limited to them, *Smith* v. *Delaney,* 64 Conn. 264. Such cases have practically always been held not to come within the statute, *Rose* v. *Wollenburg, supra,* and cases cited. The only American case which holds directly to the contrary is *Wolverton* v. *Davis,* 85 Va. 64, 6 S. E. 619, 17 Am.

St. Rep. 56, which is now overruled by the principal case the Virginia Court saying that the question must now be regarded as settled to the contrary. In addition to the grounds already discussed, these cases are usually based upon the doctrine laid down in *Davis* v. *Patrick,* 141 U. S. 479, 45 L. Ed. 826, that when a promise, though in form to answer for the debt of another, is in reality meant for the benefit of the promisor, it is an original undertaking and not within the statute. It may be doubted whether, apart from the reasons peculiar to indemnity contracts, a surety derives such benefit from having another liable with him on a debt as should bring these cases within this doctrine, but the distinction has often been made between such cases and those discussed above, *Mickley* v. *Hochsleder,* 10 Pa. Co. Ct. R. 345; *Farrell* v. *Maxwell,* 28 O. St. 383, 22 Am. St. Rep. 393; *Hartley* v. *Sandford, supra.* The same principle has controlled other cases where the interest was of a different nature. It is well illustrated by a comparison of the Connecticut cases of *Clements' Appeal,* 52 Conn. 464, and *Smith* v. *Delaney,* 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181. P. B. B. Jr.

WHAT LAW GOVERNS THE LIABILITY ON COMMERCIAL PAPER?—The recent case of *Belestin* v. *First National Bank,* (Mo. App. 1914), 164 S. W. 160, presents a novel question as to the law governing the liability of the drawer of a bill of exchange payable in another jurisdiction.

Plaintiff, living in Missouri, wished to send money to his brother, living in Greece, and bought of defendant bank in Kansas City, Missouri, its draft on a London bank, and on the same day mailed the draft to his brother. The draft was stolen before it reached the addressee, and was presented to the drawee bank, which paid it; the indorsement was in fact a forgery, but the drawee bank believed it to be genuine and paid it in good faith. The purchaser sued the drawer bank in Missouri, where they both lived, for the amount paid for the draft. The defendant set up the statutory law of England, which provides that a bill is discharged by payment in due course by the drawee, and that the drawee is deemed to have paid the bill in due course if he acts in good faith, even though the indorsement of the payee's name is a forgery. The plaintiff claimed the law of Missouri should be applied, which does not allow the good faith of the drawee banker to discharge him if he pays the bill on a forged indorsement. The court held that the bill had been paid according to the law of the place of payment, which must govern as to matters of payment, and hence the drawer as well as the drawee was discharged from any liability.

The controlling principle of the instant case is that the law of the place of performance governs as to matters of performance, and especially "for the purpose of payment and the incidents of payment." In support thereof the case of *Scudder* v. *Union National Bank,* 91 U. S. 406, is cited.

But the question actually before the court in that case was not whether the law of the place of performance should control as to the fact of payment, but only whether a parol acceptance made in Illinois of a draft drawn in that state on a firm in Missouri was to be governed by the law of Illinois,